IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANDERS TRONSEN,	*	Case No. 3:08-CV-148
Plaintiff	*	JUDGE CARR
	*	
vs.	*	DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S WRIT OF PREJUDICE
	*	
TOLEDO-LUCAS COUNTY PUBLIC LIBRARY	*	
Defendants	*	Julia R. Bates Lucas County Prosecuting Attorney By: John A. Borell (0016461) Karlene D. Henderson(0076083) Assistant Prosecuting Attorneys Lucas County Courthouse, Suite 250 Toledo, Ohio 43624 Phone: (419) 213-2001 Fax: (419) 213-2011 E-mail: JABorell@co.lucas.oh.us Counsel for Defendant
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I. STATEMENT OF THE CASE

On January 17, 2008, the plaintiff filed a pro se complaint alleging a violation of the First Amendment rights of free speech and expression. The plaintiff also seeks a temporary restraining order allowing him access to the public library during the pendency of this action.

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While not entirely clear, the plaintiff appeared to claim that his removal from the Library and subsequent temporary revocation of his library privileges violated his constitutional rights. He does NOT allege a due process or equal protection violation. Rather, he appears to assert that the defendant's adoption of such a policy violates the First Amendment.

On January 22, 2008, this Court denied the plaintiff's motion for a temporary restraining order. The plaintiff has now filed "Writ of Prejudice" seeking removal of the trial judge from the case.[1] As will be established below, the plaintiff has failed to establish any of the statutory bases for the removal of a judicial officer and his request must be denied.[2]

II. STATEMENT OF THE FACTS

On December 10, 2007, the plaintiff was at the main branch of defendant Toledo-Lucas County Library. He was using one of the public computer terminals. A woman patron was using the terminal next to the plaintiff.

The plaintiff handed the woman patron a note asking that if she "weren't involved with someone, would she email him at a nudity site". The female patron was extremely frightened by the plaintiff's conduct and notified the defendant's security personnel.

Library security personnel recognized the description provided by the patron as being the plaintiff. On December 19, 2007, the plaintiff was again at the main branch of the Library. He was recognized by security personnel and questioned about the December 10th incident. The plaintiff admitted that he handed

[1] The plaintiff also requests an extension of time, until March 30, 2008, to file a "brief in support of his case." Although not entirely cleae, it appears that the plaintiff seeks an extension of time to file a brief in support of his motion for a preliminary injunction. The defendant objects to such an extension. The defendant suggests that a better procedure would be for it to file its motion for summary judgment as currently scheduled and the plaintiff can then respond to that motion.

[2] Indeed, it is clear that the motion was only filled because the plaintiff is unhappy with the Court's ruling of the request for a TRO. The plaintiff's failure to follow the statutory procedures and his failure to assert any basis for his request indicates that this request is completely frivolous and the plaintiff should be sanctioned for filing such a

the female patron the note in question.

On December 20, 2007, the plaintiff was notified in writing that his conduct violated the defendant's posted Code of Conduct and that his Library privileges were suspended for six months. The written notification also advised the plaintiff of his right to appeal this decision.[3] The plaintiff did not invoke the administrative appeal process.

The plaintiff has a long history of harassing library patrons and staff. His library privileges were previously suspended for harassing library patrons. The plaintiff filed an action in the Lucas County Common Pleas Court challenging the suspension and seeking injunctive relief. The Court denied the request for a temporary restraining order and a preliminary injunction. The Court subsequently granted the motions to dismiss that had been filed by all defendants.

Unfortunately, disruptive library patrons have become a significant problem for the defendant. In order to control disruptive patrons and protect the rights and safety of Library staff and patrons, it has become necessary for the defendant to employ a 30 person security staff. This staff includes Lucas County Sheriff deputies and Toledo Police Officers.

It has also become necessary for the defendant to adopt a Code of Conduct which is entitled 'Eviction Procedures & Guidelines'. A copy of this policy was attached to defendant's memorandum in opposition to the motion for a temporary restraining order.

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III. LAW AND ARGUMENT

When a party filed a ***sufficient*** affidavit that a judge has a personal bias, such judge shall proceed no further, but another judge shall be assigned to hear such proceeding. 28 *U.S.C.* §144.[4] The threshold procedural requirements of §144 are ***not*** to be liberally construed. *In re Martin-Trigona*, 573 S.Supp. 1237(D. Conn. 1983), *cert. denied*, 475 U.S. 1058(1986). Strict construction is necessary to safeguard the judiciary from frivolous attacks upon its dignity and integrity and to prevent abuse. *Rademacher v.Phoenix*, 442 F.Supp. 27(D.C. Ariz. 1977).

Recusal is required only for actual bias. *Walberg v. Israel*, 766 1071, *cert. denied*, 474 U.S. 1013(1985). The test is whether a reasonable person would conclude that the judge is biased or prejudiced against a particular party and the bias or prejudice must be personal and established by matters *outside and apart from the litigation*. *Youn v. Track, Inc.*, 324 F.3d 409(6th Cir. 2003); *Davis v. Board of School Commissioners*, 517 F.2d 1044(5th Cir. 1975), *cert denied*, 425 U.S. 944(1976).

The purpose of §§144 and 455(b)(1) is not to aid discontented litigants who seek to oust a judge because he is displeased with the actions of the judge. *Creder v. Koehane*, 484 F.Supp. 11(W.D. Okla.

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[3] The defendant's written Code of Conduct includes a procedure to challenge a decision the Code has been violated.
[4] 28 *U.S.C.* §455(b)(1) also requires a judicial officer to disqualify himself if he has personal bias or prejudice concerning a party. Both 28 *U.S.C.* §144 and 28 *U.S.C.* §455(b)(1) are to be construed in pari material and the test is

1979). Thus, bias cannot be inferred from a mere pattern of adverse rulings, but requires evidence that the judge had it "in" for the party for reasons unrelated to the judge's view of the law, even if it is erroneous. *Scott v. Metropolitan Health Corp.*, 234 Fed. Appx. 341(6th Cir. 2007).

Under federal law, judge has an affirmative duty to probe legal sufficiency of the party's affidavit of prejudice and not to disqualify himself unnecessarily. *Davis v. Commissioner*, 734 F.2d 1302(8th Cir. 1984). The obligation on the part of the court not to recuse himself when there is no reason to do so is as great as the obligation to recuse when there is a valid reason. *Hall v. Burkett*, 391 F.Supp. 237(W.D. Okla. 1975); *Bumpus v. Uniroyal Tire Co.*, 385 F.Supp. 711(E.D. 1974). Where there has been no sufficient showing of bias or prejudice, a judge under scrutiny is not only permitted to continue on the case, but has an affirmative duty to do so. *In re Demjanjuk*, 584 F.Supp. 1321(N.D. Ohio 1984).

In the present case, the plaintiff's "writ of prejudice" requests recusal based solely on the following assertions: (1) at the January 22, 2008 TRO hearing, the Court made one or more statements of fact that were not supported by evidence in the case and (2) the factual determination made by the Court was presumptive and prejudices the determination of the matter, since there has not yet been a trial.

As will be established below, these allegations and the manner in which they were asserted do not comply with §144 and therefore, the plaintiff's request must be denied.

The plaintiff filed a "writ of prejudice" rather then an affidavit as required by 28 *U.S.C.* §144. As note previously, the threshold procedural requirements of §144 are ***not*** to be liberally construed. The plaintiff has failed to comply with this initial statutory requirement and therefore, his request must be denied.

In addition, the plaintiff has failed to basis his allegations on matters *outside and apart from the litigation*. His allegations of bias and prejudice are based solely on the Court's actions in this case. Such allegations are not sufficient to establish bias and prejudice.

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the same under both. *Cleveland v. Krupansky*, 619 F.2d 576(6th Cir.), *cert. denied*, 449 U.S. 834(1980).

Therefore, the plaintiff has failed to comply with the statutory requirements of §144. Therefore, this Court affirmative duty to continue presiding over this case and deny plaintiff's request.

Respectfully submitted

JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY

By: /s/ John A. Borell
John A. Borell
Karlene D. Henderson
Assistant Prosecuting Attorneys
Counsel for Defendant

CERTIFICATION

A copy of the foregoing Memorandum in Opposition was sent by email and ordinary U.S. Mail to the plaintiff on the 18th day of February 2008.

/s/ John A. Borell
John A. Borell
Assistant Prosecuting Attorney
Counsel for Defendant